

Notice of Decision and Reasons for Decision

Applicant:	'DW8'
Agency:	Department of Families, Fairness and Housing
Decision date:	31 January 2022
Exemption and provision considered:	Sections 25A(5), 33(1)
Citation:	'DW8' and Department of Families, Fairness and Housing (Freedom of Information) [2022] VICmr 3 (31 January 2022)

FREEDOM OF INFORMATION – public housing property – property maintenance history – public housing tenant – refusal to process request on grounds all documents, should any exist, would be exempt – disclosure of personal affairs information – not satisfied all documents would be exempt

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied it is apparent from the nature of the documents, as described in the Applicant's request, that all documents to which the request relates would be exempt under section 33(1). Accordingly, the requirements for section 25A(5) are not met.

The effect of my decision is the Agency is required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

31 January 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

I am requesting a hard copy of all forms of communication to [the Agency] requesting maintenance repairs to [address] and [the Agency's] responses to those communications from the same address. The documents will cover the period from [date range].

2. The Agency refused to grant access to the requested documents in accordance with the Applicant's request under section 25A(5). In doing so, the Agency was not required to identify any documents relevant to the request on grounds all documents to which the request relates, should any exist, would be exempt under section 33(1).
3. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Preliminary view provided to Agency

9. The Agency was provided with my preliminary view that it is not apparent from the nature of the documents, as described on the face of the Applicant's request, that section 33(1) would apply to all relevant documents such that each would be exempt in full.
10. At my request, the Agency provided a sample of documents relevant to the terms of the request and I have examined a copy of those documents. The Agency was advised the preliminary view remains unchanged following my review of the document sample and it was invited to provide a further submission or consider making a fresh decision.
11. In response to the preliminary view, the Agency maintained its decision to refuse to grant access to the requested documents in accordance with the request under section 25A(5) and submits:

The department remains of the view that, in the circumstances of this request, where the applicant has no apparent connection to the public housing property or tenant/s, it would be unreasonable to release documents that form part of a public housing tenant's file. While we agree that the applicant is under no obligation to disclose [their] reasons for seeking the documents, if [they] were to establish a connection to the property, the department may consider it a factor that weighs in favour of release.

Review of application of section 25A(5) to refuse to grant access to documents

12. Section 25A(5) provides an agency may refuse to grant access to a request for documents, without having identified any or all of the documents, if it is apparent from the nature of the request that all documents would be exempt in full under the FOI Act, and either there is no obligation for the agency to provide the applicant with an edited copy of the documents or the applicant does not agree to receive an edited copy of the documents.
13. The power under section 25A(5) is carefully circumscribed. A decision maker must be satisfied of the following three requirements that operate to limit its application:
 - (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent all requested documents are exempt from release.
 - (c) Third, it must be apparent from:
 - i. the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
 - ii. the applicant's request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.¹

What is the essential character of the requested document?

14. Having considered the terms of the Applicant's request, I consider the essential quality and character of the documents is a request for access to a copy of 'all documents' relating to the maintenance of a public housing property at a particular point in time. I am of the opinion the essential character of the documents, should any exist, would encompass a variety of administrative records relating to maintenance and repairs carried out at the property.
15. Accordingly, I am satisfied the nature of the documents is objectively apparent from the face of the request and the first requirement of section 25A(5) is met.

Would all of the requested document, as described in the request, be exempt?

16. As stated above, in refusing access to the requested document under section 25A(5), the Agency submits all documents, should any exist, would be exempt in full under section 33(1).
17. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (a **third party**);² and
 - (b) such disclosure would be 'unreasonable'.

¹ *Knight v Corrections Victoria* [2010] VSC 338.

² Sections 33(1) and (2).

Would the requested documents contain personal affairs information?

18. Personal affairs information includes any information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.³
19. The Victorian Civil and Administrative Tribunal (**VCAT**) has interpreted the scope of 'personal affairs information' broadly to include matters relating to health, private behaviour, home life or personal or family relationships of individuals.⁴
20. I am satisfied any documents meeting the terms of the Applicant's request would contain the personal affairs information of third parties, including names and contact details for any tenant occupying the property, tradespersons carrying out maintenance or repairs at the property and Agency officers arranging for works to be carried out at the property.
21. However, on the face of the Applicant's request, I am not satisfied the entire content of all relevant documents would constitute personal affairs information. For example, based on the terms of the request, the requested documents may contain general information relating to maintenance or repairs conducted at the property, including details of the Agency's actions in relation to any such repairs and associated costs, which do not relate directly to any individual's personal affairs.

Would release of the personal affairs information of third parties be unreasonable in the circumstances?

22. Determining whether disclosure of a document would be unreasonable in the circumstances involves balancing the public interest in the disclosure of official information held by a government agency with the interest in protecting an individual's personal privacy in the circumstances.⁵
23. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the interest in protecting a third party's right to personal privacy in the circumstances.
24. The Victorian Court of Appeal has held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.⁶ Further, '[t]he protection of privacy, which lies at the heart of section 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.⁷
25. In *Coulson v Department of Premier and Cabinet*,⁸ VCAT held that whether or not an agency staff member's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.
26. In my view, the following factors are relevant when considering whether disclosure of personal affairs information would be unreasonable in the circumstances:
 - (a) the nature of the personal affairs information, for example, whether it is sensitive or its current relevance;

³ Section 33(9).

⁴ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁵ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [76].

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [79].

⁸ *Review and Regulation* [2018] VCAT 229.

- (b) the circumstances in which the information was obtained, for example, whether it was obtained involuntarily or in confidence;
 - (c) the Applicant's interest in the information, including the purpose for seeking access to the documents;
 - (d) whether any public interest would be promoted by releasing the personal affairs information;
 - (e) whether the individuals to whom the information relates would object to the release of the information;
 - (f) the likelihood of further disclosure of the information, if released; and
 - (g) whether disclosure of the information would, or would be reasonably like to, endanger the life or physical safety of any person.
27. On the information before me, I am satisfied relevant third parties would be likely to object to disclosure of their personal affairs information and there is no public interest to be promoted in the disclosure of such information. Rather, I consider the public interest lies in protecting the personal affairs information of third parties. Therefore I consider it would be unreasonable to release certain personal affairs information relating to any tenant in the requested documents.
28. However, for the purpose of section 25A(5), I am not satisfied it would necessarily be unreasonable to release other parts of the requested documents that may contain general information about standard maintenance and repair requests. I also note the Applicant's request seeks access to correspondence authored by the Agency.
29. In relation to the personal affairs of any Agency officer, subject to the Agency demonstrating special circumstances apply, I do not consider it would be unreasonable to disclose the name of an Agency officer where a document merely records or represents the officer, regardless of their seniority, carrying out their usual duties or responsibilities as a public servant. For example, in this case, potentially assessing and responding to property maintenance and repair requests. The nature of such information is to be contrasted with personal affairs information concerning an agency officer in their personal or private capacity.
30. I acknowledge the Agency's submission in relation to the Applicant not having provided a reason for seeking access to the requested documents and, the Agency may have reached a different decision if they had done so. However, on the information before me, I am not satisfied all personal affairs information in the requested documents, should any exist, would be exempt under section 33(1).
31. I consider section 33(1) is likely to exempt certain personal affairs information in the requested documents, but would be unlikely to exempt from release all information in the documents. Therefore, the remaining information in the documents would predominantly constitute information regarding maintenance and repair works conducted at a public housing property, which I consider would not necessarily be exempt from release under section 33(1).
32. Accordingly, I am not satisfied the requirement of section 25A(5) that all of the requested documents as described in the Applicant's request, would be exempt under section 33(1) is met.

Would the Agency be required to delete any exempt or irrelevant information in the documents?

33. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁰
35. The Agency's decision states:
- We consider that no obligation would arise under section 25 to provide an edited copy because to do so would be impractical. It would be impossible to separate any information from the documents as suitable for release, as any document that existed would be entirely exempt on the basis of personal privacy for the reasons outlined above.
36. I do not accept the Agency's submission that it would be impossible to provide the Applicant with an edited copy of one or more relevant documents given the nature of the documents sought.
37. Having considered the circumstances of this matter, I am satisfied there would be scope to provide the Applicant with an edited copy of one or more of the requested documents, should any exist, with any exempt information deleted in accordance with section 25. I am also satisfied it would be practicable to do so as it would likely not require substantial time and effort, and the edited documents would likely retain sufficient meaning.
38. Accordingly, I am not satisfied the requirement of section 25A(5) that the Agency would not be required to delete any exempt or irrelevant information in the requested documents in accordance with section 25 is met.

Conclusion

39. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply to a limited category of cases only.
40. Having considered the application of section 25A(5) and for the reasons set out above, I am not satisfied it is apparent from the terms of the Applicant's request that all documents relevant to the request, should any exist, would be exempt in full under section 33(1).
41. Further, I am not satisfied no obligation would arise for the Agency to provide the Applicant with an edited copy of one or more of the requested documents, should any exist, with exempt information deleted in accordance with section 25.
42. Accordingly, I am not satisfied each of the requirements of section 25A(5) are met such that the Applicant's request for access to the requested document can be categorically refused.
43. The effect of my decision is the Agency is required to search for, identify and assess any document or documents relevant to the terms of the Applicant's request in accordance the FOI Act.

Review rights

44. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹

⁹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹⁰ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
47. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
48. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹⁴

When this decision takes effect

49. My decision does not take effect until the Agency's 14 day review period expires, after which I consider the Agency is required to comply with the statutory timeframes in section 21 when processing the Applicant's request in accordance with the FOI Act.
50. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).